No. 97-1443

In the
Supreme Court of the United States
October Term, 1997

JEFFREY MAUSOLF, ET AL.,
Petitioners,

vs.

BRUCE BABBITT, ET AL.,
Respondents,

VOYAGEURS REGION NATIONAL PARK ASSOCIATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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SYNOPSIS

Petitioners contend that judicial review of agency action is over once the agency dismisses its appeal of a successful challenge. Absent this Court's review of the Eighth Circuit's contrary holding, private intervenors will essentially be able to prosecute the agency's appeal as self-appointed guardians of the public interest. In their brief, the Government Respondents ("Government") contend that (1) the underlying challenge to the agency action is itself moot; and (2) the private intervenors had demonstrated Article III standing to intervene before the Government dismissed its case and abandoned its regulations. For the reasons stated below, the first contention is incorrect. It also proves too much: if the underlying challenge was indeed moot, then the Eighth Circuit should be instructed to vacate its opinion below as moot. The second contention is a nonsequitur. What is at issue here is whether these parties ***retained*** their standing once the agency regulations they supported were abandoned by the agency. Moreover, by conceding the existence of an intercircuit conflict, the Government concedes that the case is worthy of certiorari.

SUPPLEMENTAL STATEMENT OF FACTS

On December 16, 1992, the Voyageurs National Park superintendent, following National Park Service and Fish and Wildlife Service orders, issued an addendum to the park's 1992 Compendium of regulations, which closed 18 specific lakeshore and bay areas to snowmobiling ("Lakeshore Closures"). Admin. Record at Tab 53. As part of the 1993 compendium, the park re-issued the same closures. Id. at Tab 57. Again in the 1994 compendium, the park re-issued the same closures. Id. at Tab 59.

In January 1994 the Petitioner Snowmobilers filed a complaint challenging the Government's "about-face" in

snowmobiling policy – beginning with the FWS February 28, 1992 biological opinion and continuing in the 1992 compendium and each subsequent compendium – as arbitrary and capricious. Complaint ¶¶ 28-41. The parties agreed to a three-binder administrative record, and presented cross-motions for summary judgment in August 1994.

In January 1996, the district court granted the Snowmobilers' motion for summary judgment, remanded the matter to the Government for further evidentiary findings and ordered the Government "enjoined from enforcing the lakeshore closures." Mausolf v. Babbitt, 913 F.Supp. 1334, 1344 (D. Minn. 1996), rev'd 125 F.3d 661 (8th Cir. 1997). The Government did not enforce the Lakeshore Closures as it collected additional evidence to justify the closures. See Snowmobilers' Petition for Writ of Certiorari at 11-12 & nn. 1, 2 (detailing Government's response after 1996 district court order).

ARGUMENT

I. BECAUSE THE GOVERNMENT ISSUED AND RE-ISSUED IDENTICAL LAKESHORE CLOSURES, BASED ON THE SAME ADMINISTRATIVE RECORD, AND THE DISTRICT COURT ENJOINED THE GOVERNMENT FROM ENFORCING THESE LAKESHORE CLOSURES ON THAT RECORD, THE SNOWMOBILERS PRESENT A JUSTICIABLE ISSUE.

The Government responds to the Snowmobilers' argument that the Eighth Circuit improperly decided a non-justiciable issue by claiming that the Snowmobilers' appeal is itself moot and died with the park's 1992 compendium. The Government's argument logically leads this Court to summarily vacate the Eighth Circuit's decision as moot; the

Snowmobilers agree that the decision should be summarily vacated, albeit for different reasons.

But the Snowmobilers disagree with the Government's report of the record. The Government first issued the Lakeshore Closures in 1992 and continued to re-issue them each year thereafter. The Eighth Circuit described the 1992 order as "renewed" in 1993 and 1994. Mausolf v. Babbitt, 85 F.3d 1295, 1298 (8th Cir. 1996). The Government and the Snowmobilers submitted an agreed-upon administrative record to the district court. The Government never supplemented or otherwise modified this record; the Government continued to re-issue the Lakeshore Closures with no new biological opinions, on-site research or other new data. On this record, the district court rejected the Lakeshore Closures, and enjoined the Government from enforcing the Lakeshore Closures. The district court's injunction is not tied to a particular compendium – nor should it be when all the Lakeshore Closures since 1992 were identical, based on the same administrative record. The Eighth Circuit reversed on this same record. Whether the Eighth Circuit improperly reached and decided the merits of the Lakeshore Closures is properly before this Court.

Alternatively, this issue may be characterized as justiciable because it is capable of repetition yet avoiding judicial review. Given the Park's repeated enactment of the Lakeshore Closures, a "reasonable expectation" or "demonstrable probability" exists that this same lakeshore closure controversy would recur against the same complainant, the Snowmobilers. Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per curium).

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE EIGHTH CIRCUIT IGNORED THIS COURT'S DIAMOND v. CHARLES DECISION. EVEN ACCEPTING THE GOVERNMENT'S

LIMITED INTERPRETATION OF DIAMOND, THE LOWER COURTS HAVE INTERPRETED DIAMOND DIFFERENTLY, AND THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE THE SPLIT AMONG COURTS.

The Government's arguments only emphasize that the Snowmobilers' petition merits certiorari review to address the viability and interpretation of Diamond v. Charles, 476 U.S. 54 (1986). In Diamond, this Court rejected an intervenor's attempt to defend state regulations on appeal absent the state. 476 U.S. at 58. The Diamond opinion repeatedly stresses the state's ability to defend its regulations, and the inability of a private party – even as an intervenor – to uphold those regulations on appeal without the state. See, e.g., id. at 56 ("Because a private party whose own conduct is neither implicated nor threatened by a criminal statue has no judicially cognizable interest in the state's defense, we dismiss the appeal for want of jurisdiction."); id. at 64 ("this ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join."). The Snowmobilers contend that the Eighth Circuit effectively ignored this Court's decision in Diamond, presenting a significant issue of the continuing viability of Diamond.

The Government argues that Diamond is limited to intervenors without Article III standing. Such a contention confuses the doctrine of mootness with the doctrine of standing. Mootness is the doctrine of standing set in a time frame; the mootness inquiry is whether the intervenor retains its standing after a particular event. See Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1069 n.22 (1997). To say, then, that a litigant once had standing does not answer the mootness inquiry. The question here is

whether the litigant retained this standing after the Government abandoned the regulations at issue. The Government never answers this question,

Even assuming the Government's interpretation is correct, it presents an important intercircuit conflict for this Court to resolve. The D.C. and Ninth Circuits, in addition to the Eighth Circuit decision below, limit the Diamond decision to its facts. National Wildlife Fed'n v. Lujan, 928 F.2d 453 (D.C. Cir. 1992); Yniguez v. State of Arizona, 939 F.2d 813 (9th Cir. 1991). By contrast, the First and Sixth Circuits recognize the broad Diamond holding. United States v. AVX Corp., 962 F.2d 108 (1st Cir. 1992); Associated Builders & Contractors v. Perry, 16 F.3d 688 (6th Cir. 1994). In short, both the Snowmobilers' and the Government's interpretation of Diamond support certiorari review.

CONCLUSION

This Court should therefore grant the Snowmobilers a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

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